



## OMBUDSMAN COMPLAINT A2012-1355

### Finding of Record and Recommendations

*(This investigative report has been edited and redacted to remove information made confidential by Alaska Statute and to protect privacy rights.)*

**June 12, 2014**

### **SUMMARY OF COMPLAINT**

An Alaska business owner contacted the Office of the Ombudsman in October 2012 to complain that the 2012 grant process under the Emerging Energy Technology Fund (Fund or EETF) was flawed in many respects. The Fund is administered by the Department of Commerce, Community, and Economic Development, Alaska Energy Authority. The business owner's company had applied for a grant under the Fund and, at the time the ombudsman complaint was filed, an appeal of the agency's rejection of the project for a grant award was pending. The agency ultimately upheld its no-funding decision for the project.

After initial review, the ombudsman determined that four issues warranted further investigation.

***Allegation 1: Unfair: AEA allowed applicants that did not meet the basic eligibility criteria to proceed past the initial phase of the grant review process and one such applicant ultimately received a \$740,000 grant from the agency.***

***Allegation 2: Arbitrary: The agency did not provide notice of several meetings to interested parties through the use of the EETF list server, opting instead to provide notice only through the state's online public notice system.***

***Allegation 3: Contrary to law: AEA failed to award grants using the priorities required by AS 42.45.375(d).***

***Allegation 4: Unfair: AEA allowed its contractor to review applications and make grant recommendations for applications where the contractor's staff participated in several of the proposed projects, creating a conflict of interest.***

Assistant Ombudsman Kate Higgins notified AEA Executive Director Sara Fisher-Goad of the complaint on April 18, 2013 via email. Ms. Higgins investigated the allegations and drafted the preliminary report.

## BACKGROUND

In 2010, the Alaska Legislature enacted Alaska Statute (AS) 42.45.375 establishing the Emerging Energy Technology Fund. The Alaska Energy Authority (AEA) administers the Fund. The Fund is intended to “promote the expansion of energy sources available to Alaskans.”<sup>1</sup> With assistance of an advisory committee (Advisory Committee), the AEA

may make grants from the fund to eligible applicants for demonstration projects of technologies that have a reasonable expectation to be commercially viable within five years and that are designed to

- (1) test emerging energy technologies or methods of conserving energy;
- (2) improve an existing energy technology; or
- (3) deploy an existing technology that has not previously been demonstrated in the state.<sup>2</sup>

The Advisory Committee consists of seven members, appointed by the governor to serve staggered three-year terms. Each member of the Advisory Committee represents a distinct interest or stakeholder group, including members of businesses or organizations engaged in the renewable and fossil fuel energy sectors, the Denali Commission, and the National Renewable Energy Laboratory.<sup>3</sup>

AEA issued the first Fund grant request in 2011 but later rescinded it because the agency had not promulgated regulations to implement the program. In early 2012 the agency promulgated regulations to implement the Fund. The regulations can be located at Alaska Administrative Code (AAC) 3.107.700-799.

The 2012 grant process is at issue in this complaint. The State of Alaska agreed to provide up to \$4.8 million to fund the program and the Denali Commission, a federal agency, agreed to provide up to \$4.1 million. The agency’s identification number for this grant is AEA-12-047.

AEA is authorized to contract with the University of Alaska “to provide technical and economic review and analysis for the advisory committee.”<sup>4</sup> AEA opted to exercise this authority and entered into a memorandum of understanding (MOU) with the University of Alaska Fairbanks, Alaska Center for Energy and Power (ACEP). As part of the agreement, ACEP offered the use of its research and testing facilities to any successful applicant at a reduced cost.

The 2012 grant process consisted of two stages:

- *Stage 1:* Seventy applicants submitted short abstracts of their proposed project. AEA staff then completed a “grant review” to ensure that applicants met the eligibility requirements and that the abstracts were complete and responsive to the request. At this

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<sup>1</sup> AS 42.45.375(a).

<sup>2</sup> AS 42.45.375(c).

<sup>3</sup> AS 42.45.375(f).

<sup>4</sup> AS 42.45.375(e).

phase, AEA rejected 10 projects. The remaining 60 projects were then given a “technical review” by both AEA and ACEP staff to assess the technical readiness of each project. Using the technical reviews, the Advisory Committee ranked each abstract and recommended that 27 projects proceed to the next stage. These projects represented approximately 200 percent of the funding available for the program.

- *Stage 2:* Successful stage 1 applicants, and several others who successfully requested reconsideration of their abstracts, submitted full proposals. The Advisory Committee scored each proposal using criteria listed in 3 AAC 107.760. Additionally, the applicants gave 30-minute presentations to the committee, which included taking questions from the committee about the project. At the conclusion of this phase, the Advisory Committee made a yes or no recommendation for funding. AEA staff, however, made the final decision on which projects would be funded.

The Complainant contacted the ombudsman’s office after the complainant’s proposed project received a no-funding decision. The Complainant explained that the project initially had been eliminated after the first stage of the review process. AEA allowed the Complainant to submit a full proposal after the Complainant requested reconsideration. At the time the Complainant filed an ombudsman complaint, the Complainant had also requested reconsideration of AEA’s decision not to select the complainant’s project for funding. The no-funding decision was subsequently upheld by the agency.

The Complainant alleged many flaws in the Fund’s grant process. When asked to list what the agency did wrong, the Complainant wrote:

Alaska Energy Authority (AEA) violated Alaska State Regulations for the Emerging Energy Technology Fund (EETF). AEA also violated Alaska Ethics Laws, resulting in a conflict of interest favoring its contractor, the University of Alaska – Fairbanks Alaska Center for Energy and Power (UAF – ACEP). The following list outlines these and other situations that the AEA used its influence to wrongly award state and federal grant funds:

1. Improper influence for State Grants violates ethics laws for Alaska.
2. Conflict of interest by UAF, AEA, and Denali Commission is evident.
3. Awards were made to applicants who were not eligible to apply.
4. Largest grant awards went to out of state applicants.
5. Agencies with no commercialization plans received grants.
6. Most of the technologies awarded were owned by L-48 companies.
7. Scoring was random and favored applicants who did not meet minimum standards.
8. ACEP will benefit monetarily from the grants awarded for projects that are directly based within its research facilities. ACEP helped to select these grantees, creating an apparent conflict of interest.

The Complainant did not provide an explanation or evidence regarding several of these allegations, including the allegations that AEA violated the state’s ethics laws, that there was a conflict of interest between UAF, AEA, and the Denali Commission, that agencies with no

commercialization plans received grants, and that scoring was random and favored less-qualified applicants. The ombudsman declined to review those allegations.

## INVESTIGATION

While investigating this complaint, the investigator reviewed the complainant's documentation as well as the Fund's enabling statute and related regulations. The investigator also reviewed the agency's grant file consisting of, among other things, the applications received for the 2012 grant cycle and the agency's reviews, recommendations, and internal notes. The investigator also sent several inquiries to AEA's Executive Director regarding the grant award process.

### **Did AEA allow ineligible applicants to proceed with grant process?**

The Complainant alleged that AEA awarded four grants to ineligible applicants. The Complainant named Genesis Machining and Fabrication, Oceana Energy Company, Boschma Research, and Altaeros Energies, Inc. as the ineligible applicants.

AS 42.45.375(j)(1) defines "eligible applicant" as:

- A. an electric utility holding a certificate of public convenience and necessity under AS 42.05;
- B. an independent power producer;
- C. a local government, quasi-governmental entity, or other governmental entity, including a tribal council or housing authority;
- D. a business holding an Alaska business license; or
- E. a nonprofit organization.

AEA's Request for Grant Applications (RFA), dated January 27, 2012, stated that applicant eligibility would be assessed during the initial Grant Review phase. Section 4 of the RFA discusses Grant Eligibility and Requirements and stated that "Applications whose applicants do not meet these requirements will be rejected without further evaluation."<sup>5</sup>

The agency's internal guidelines used to evaluate applications stated that:

For the Step 1 abstract, the applicant is to provide proof of eligibility. This proof can range from a copy of a business license or a certificate of public convenience to simply a business license number or nonprofit registration information. **If the provided proof of eligibility is unclear, the Authority should follow up directly with the applicant. If no proof of eligibility is provided or mentioned, the application should be rejected.** [Emphasis added]

Initial abstracts for the RFA were due on March 9, 2012 so, presumably, all applicants needed to be eligible by that date.

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<sup>5</sup> See RFA, pages 8-9.

Three of the applicants the Complainant alleged to be ineligible - Genesis Machining and Fabrication, Oceana Energy Company, and Boschma Research - all possessed a valid Alaska business license issued prior to the RFA due date and appeared to be eligible under the program requirements.

Altaeros Energies, Inc.'s business license, however, was not issued until May 31, 2012, well after the first stage of the Fund grant process concluded. AEA's documentation from the eligibility review showed that it was aware that Altaeros did not meet the eligibility requirement, stating:

The lead applicant is not an Alaska organization, although partners are. Applicant: Altaeros Energies is in the process of opening operations in Alaska, and filing for Certificate of Authority to operate as a foreign corporation and an Alaska business license. All other project partners are Alaska businesses or organizations. Altaeros will provide a copy of its Alaska business license as part of a full proposal later this Spring.

Instead of rejecting Altaeros for failing to meet the statutory eligibility requirements, AEA invited it to submit a full proposal for the second stage of the grant review process. Altaeros ultimately received a grant for \$740,115.00.

The investigator also reviewed the eligibility documentation for all applications submitted to AEA. One other applicant did not meet the eligibility requirement until after the RFA due date. The applicant, Chininik Wind Group, did not receive its Alaska business license until March 19, 2012, which was 10 days after the abstracts were due and four days after AEA staff contacted the applicant to check applicant's eligibility. That project was also allowed to proceed to the technical review portion of the first stage of the grant process but did not make it to the second stage of the grant process.

#### **Did AEA fail to notify interested parties of several meetings via the Fund list server?**

The Complainant first learned that AEA held several public meetings to discuss Fund applications only after the meetings occurred. The Complainant had signed up for the agency's list server but did not received notice of those meetings.

The RFA stated, see page 1:

To receive email notices regarding the Emerging Energy Technology Fund Grant Program, click on the link below to the State of Alaska List Server; scroll down until you find EmergingEnergyFund click 'Join' and follow the instructions.

The investigator determined that AEA issued public notice of two meetings through the State of Alaska Online Public Notice System but not via the list server. One, held on April 27, 2012, was for the purposes of discussing the abstracts received for the grant program and the second, held on August 16, 2012, was to discuss the full proposals.

When the investigator asked the agency why it did not provide notice of those meetings to those who specifically signed up for email notifications about the Fund program per the RFA directions, Ms. Fisher-Goad responded:

The Alaska Energy Authority (AEA) strives to provide notice above and beyond the required public meeting notice requirements; however, public notice procedures do not include separate notification to the email distribution list.

The agency provided a list of the people who had signed up for Fund notices via the list server. This list contained 357 entries, including the Complainant. Unless those people were also checking the state's online public notice system they would not have received notice of the April 27 and August 16 meetings, even though they signed up to receive notices about the program.

State law requires that:

Reasonable public notice shall be given for all meetings required to be open under this section. The notice must include the date, time, and place of the meeting and, if the meeting is by teleconference, the location of any teleconferencing facilities that will be used. Subject to posting notice of a meeting on the Alaska Online Public Notice System as required by AS 44.62.175(a), the notice may be given using print or broadcast media.<sup>6</sup>

The statute requires use of the Alaska Online Public Notice System as a minimum level of notice. Any other type of notice is dictated by what is "reasonable" for the type of meeting. AEA is correct that use of a list server is not specifically and absolutely required by the state's open meetings law, but AEA appears to be conflating the online posting required by AS 44.62.175(a) (mandating use of the Alaska Online Public Notice System) with the broader requirement for reasonable notice under AS 44.62.310.

### **Did AEA fail to follow statutory priorities in awarding grants?**

The Complainant alleged that AEA violated state law by awarding grants without considering the priorities as required by statute. The Complainant alleged that the majority of the grants awarded went to out-of-state applicants. AS 42.45.375(d) provides that:

In making grants under this section, the authority, in consultation with the advisory committee established under (f) of this section, *shall* give priority to

- (1) Alaska residents, associations, organizations, or institutions;
- (2) projects that demonstrate partnership with the University of Alaska or another Alaska postsecondary institution;
- (3) projects supported by matching funds or in-kind partnerships; and
- (4) projects with potential for widespread deployment in the state. [Emphasis added]

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<sup>6</sup> AS 44.62.310(e).

Additionally, 3 AAC 107.760 states “[t]he criteria for reviewing full proposals *must* include how well the full proposal addresses the statutory priorities at AS 42.45.375.” [Emphasis added]

The statutory priorities in AS 42.45.375(d) are not, however, the only statutory priorities AEA must follow. Another subsection of the statute, AS 42.45.375(c), sets the technical requirements for the grant funding, limiting grants to the following:

demonstration projects of technologies that have a reasonable expectation to be commercially viable within five years and that are designed to

- (1) test emerging energy technologies or methods of conserving energy;
- (2) improve an existing energy technology; or
- (3) deploy an existing technology that has not previously been demonstrated in the state.

The project has to qualify under AS 42.45.375(c), not just meet priorities set by AS 42.45.375(d).

The RFA also addressed the statutory priorities in Section 4.3, [pp. 10]. This section simply restated the priorities listed in AS 42.45.375(d). However, the RFA also included a section specifically addressing one of the statutory preference criteria – “projects supported by matching funds or in-kind partnerships.”<sup>7</sup> Section 4.5 states, in relevant part:

When reviewing applications, AS 42.45.375 provides the Authority *shall* prioritize applications that commit the applicant to provide matching contributions. There is no formal match requirement under this RFA, however, match will be used to score and rank projects, and is highly recommended. The Authority will apply this scoring during the grant review process (Stage 1). [Emphasis added]

In an October 9, 2012, letter to the Complainant, AEA described its use of the priority criteria as follows:

The recommendations for funding by the Advisory Committee were made without consideration to the amount of available funding. If the projects recommended for funding exceeded the amount available for award, *AEA would have combined the technical and priority scores in order to determine funding priorities*. As this was not the case, the scores did not impact final project selection. [Emphasis added]

When the ombudsman investigator inquired about AEA’s use of the statutory priorities, AEA responded as follows:

AEA scored the priority criteria with the intention of applying the priority scores to those projects recommended for funding by the EETF Advisory Committee in

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<sup>7</sup> AS 42.45.375(d)(3)

order to determine the final ranking of projects for funding. However, the total funds requested by those projects that were recommended for funding by the Advisory Committee was less than the amount available for funding, and as a result, *when the priority scores were applied*, they did not impact which projects received funding.

The purpose of separating the priority scoring from the technical scoring was to receive initial funding recommendations from the Advisory Committee that were based solely on the technical merits of the projects. In addition, the process was intended to eliminate the possibility of a project that the committee has judged not worthy of funding – based on technical grounds – from receiving a high score due to the priority criteria. [Emphasis added]

After reviewing the agency’s scoring documentation for both stages of the grant process, it appeared that the Advisory Committee scored, and utilized, the priority criteria during the first stage of the grant process when it reviewed the abstracts and recommended projects to submit full proposals. However, it appears that AEA scored, but did not utilize, the priority scores during the second stage of the grant process when it was selecting projects to fund.

AEA indicated that it did not want to award a grant to a less-deserving applicant simply because it scored high on the priority criteria. Instead the agency intended to use the priority scores as a “tie-breaker” in the event that it did not have enough funds to make grants to all of the projects recommended for funding.

AS 42.45.375(d) requires AEA to make use of the priority criteria when awarding grants. Merriam-Webster defines “priority” as:

1 a (1) : the quality or state of being prior (2) : precedence in date or position of publication

b (1) : superiority in rank, position, or privilege (2) : legal precedence in exercise of rights over the same subject matter

2 : a preferential rating; especially: *one that allocates rights to goods and services usually in limited supply*

3 : something given or meriting attention before competing alternatives [Emphasis added]<sup>8</sup>

AEA’s rationale for utilizing the priority criteria in the manner it did appears reasonable. Here, AEA indicated that it would have used the priority scores if there had not been enough funds to award grants to all of the projects recommended for funding after the technical analysis was complete, but because there was enough money to fund all of the recommended projects that met the technical requirements, the priority scores were not needed. Essentially the agency would have used the scores to allocate grant awards had the funds been in limited supply, to use the language of the definition cited above.

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<sup>8</sup> <http://www.merriam-webster.com/dictionary/priority>. Last viewed September 18, 2013.

**Did AEA allow its contractor, ACEP, to review and make funding recommendations on applications submitted by the contractor's staff, creating a conflict of interest?**

The Complainant alleged that the Alaska Center for Energy and Power (ACEP), who contracted with AEA to provide technical support and review of Fund applications, had a conflict of interest because some of its affiliated faculty participated in projects submitted for Fund grants and because ACEP itself was directly partnered with Fund applicants.

ACEP is housed within the Institute of Northern Engineering, part of the College of Engineering and Mining at the University of Alaska Fairbanks. According to its Website, ACEP

is an applied energy research program based at the University of Alaska. ACEP was formed in January, 2008 with the goal of meeting Alaska's unique energy research needs, and operated under a private sector business model within the University system.<sup>9</sup>

The Alaska Energy Authority entered into a memorandum of understanding (MOU) with ACEP, as allowed in the Fund's enabling statute, to provide technical assistance in reviewing grant applications. The MOU states in relevant part:

In order to avoid conflict of interest, ACEP staff and affiliated faculty will recuse themselves from participating in proposals submitted under the EETF program, either as a lead or sub-award. Affiliated faculty will be determined at the time this MOU is signed, and ACEP will provide a list to AEA and the advisory committee at that time.

ACEP subsequently drafted a memo, dated February 22, 2012, identifying individual ACEP staff and affiliated faculty who would be involved in reviewing the Fund proposals.

The MOU seems to indicate that all ACEP staff were prohibited but that only the affiliated faculty members listed by ACEP were barred from participation in proposals. However, the subsequent memo identifying specific individuals participating in the Fund review included a mix of ACEP staff and affiliated faculty. This memo seemed to imply that only the ACEP staff named in the memo, and not all ACEP staff, were prohibited from participating in Fund proposals.

The ombudsman investigator asked the AEA Executive Director for clarification of the MOU's recusal requirement, and she responded:

All ACEP staff, regardless of their participation in application review, were prohibited from participating in proposals submitted under the EETF program. Additionally, all affiliated faculty identified in the February 22, 2012 memo were prohibited from participating in proposals submitted under the EETF program.

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<sup>9</sup> <http://www.uaf.edu/acep/about/>. As of September 19, 2013.

No ACEP staff did participate in proposals submitted under the EETF program, nor did any affiliated faculty that assisted in application review. ACEP staff member Brent Sheets responded to inquiries from several applicants regarding the ACEP test facilities available to all EETF applicants.

None of the affiliated faculty alleged by the Complainant to have submitted Fund proposals were on the list of affiliated faculty that ACEP indicated would be working on the Fund analysis and, thus, barred from participating in the projects.

The Complainant also alleged that several Fund proposals were partnered with ACEP directly. The Complainant's allegation was based on the fact that the applicants had referenced either ACEP or the Alaska Hydrokinetic Energy Research Center (AHERC), a subsidiary of ACEP, in their proposals. The ombudsman investigator reviewed the proposals alleged to have partnered with ACEP and determined that the Complainant's allegation, for the most part, did not have merit. There were several proposals that referenced ACEP or AHERC, but the references were generally made in regard to partnerships on prior projects or even stating that the applicant intended to use ACEP's testing facilities – an offer that was extended to all Fund applicants.

However, one ACEP staff member, Brent Sheets, appears to have participated in a proposal. The proposal from Oceana Energy Company listed Brent Sheets as a technical lead in their proposal. Mr. Sheets is ACEP's research manager, was listed in ACEP's February 22, 2012, memo as ACEP's point of contact for questions relating to the Fund review process, and is referenced above as responding to Fund inquiries. As an ACEP staff member, he was prohibited by the terms of the MOU from participating in Fund applications. Oceana's proposal was recommended for funding by AEA at the conclusion of the grant review process.

## **ANALYSIS AND FINDINGS**

AS 24.55.150 authorizes the ombudsman to investigate administrative acts that the ombudsman has reason to believe might be contrary to law; unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law; based on a mistake of fact; based on improper or irrelevant grounds; unsupported by an adequate statement of reasons; performed in an inefficient or discourteous manner; or otherwise erroneous. The ombudsman may investigate to find an appropriate remedy.

Under 21 AAC 20.210 the ombudsman evaluates evidence relating to a complaint against a state agency to determine whether criticism of the agency's actions is valid, and then makes a finding that the complaint is *justified*, *partially justified*, *not supported*, or *indeterminate*. A complaint is *justified* "if, on the basis of the evidence obtained during investigation, the ombudsman determines that the complainant's criticism of the administrative act is valid." Conversely, a complaint is *not supported* if the evidence shows that the administrative act was appropriate. If the ombudsman finds both that a complaint is *justified* and that the complainant's action or inaction materially affected the agency's action, the complaint may be found *partially justified*. A complaint is *indeterminate* if the evidence is insufficient "to determine conclusively" whether criticism of the administrative act is valid.

The standard used to evaluate all Ombudsman complaints is **the preponderance of the evidence**. If the preponderance of the evidence indicates that it is more likely than not that the administrative act took place and the complainant's criticism of it is valid, the allegation is found justified. If the complaint does not meet the standard, the complaint is found to be unsupported.

***Allegation 1: Unfair: AEA allowed applicants that did not meet the basic eligibility criteria to proceed past the initial phase of the grant review process and one such applicant ultimately received a \$740,000 grant from the agency.***

The Office of the Ombudsman's Policies and Procedures Manual at 4040(3)(F) defines unfair as "the agency applied standards or principles inconsistently in making a decision."

The agency's RFA stated that ineligible applicants would be rejected at the grant review portion of the first stage of the process, but then it allowed two applicants who were ineligible to proceed. One of the applicants, Altaeros, ultimately received a substantial grant from the Fund. By allowing Altaeros and the other applicant the opportunity to proceed in the process, the agency deviated from the stated standards in the RFA and, thus, acted unfairly.

The ombudsman proposed to find this allegation justified.

AEA Response: The agency wrote that it did "not dispute the conclusions regarding the eligibility of Altaeros Energies, Inc., however, page 5 of the preliminary report indicates that another applicant, Chaninik Wind Group, Inc. should also have been deemed ineligible. While the Chaninik Wind Group, Inc. did not receive its business license until after the abstract due date, it was found by AEA to be a non-profit corporation in good standing at the time the abstract due date [sic], and was therefore an eligible applicant."

Ombudsman Comment: AEA provided documentation from the Corporation, Business, and Professional Licensing website showing that Chaninik Wind Group, Inc. was indeed a non-profit at the time the abstract was due and, thus, was eligible to proceed.

The Office of the Ombudsman acknowledges the error made with regard to Chaninik Wind Group, Inc.'s eligibility; however, that does not change the outcome of the allegation as to Altaeros Energies, Inc. As such, the justified finding stands.

***Allegation 2: Arbitrary: The agency did not provide notice of several meetings to interested parties through the use of the EETF list server, opting instead to provide notice only through the state's online public notice system.***

Arbitrary is defined at 4040(5)(A) as "the agency's position or decision was not based upon an intelligible or understandable public policy decision."

AEA is correct that it is not specifically *required* to provide notice of its meetings beyond posting on the Alaska Online Public Notice System. However, the relevant portion of the Open Meetings Act, AS 44.62.310(e), requires "reasonable" public notice, with online posting as the first, but not necessarily only, method of giving notice.

In the RFA, the agency invited people interested in the Fund program to sign up for the list server and essentially assured those persons that, in doing so, they would receive *all* of the agency's notices regarding the Fund program. It makes no sense to invite interested parties to sign up to receive notices about the grant program and then not send them the notices they signed up to receive. It makes even less sense to send some notices, but then omit some of the relevant notices. Not only were the individuals on the list not receiving everything they signed up for,

they would not necessarily realize that the list server's notices were incomplete, i.e. unreliable. Having signed up for what was purportedly a specific mailing list for Fund grant-related notices, these individuals had no reason to keep checking the general online public notice program for what was supposedly going to be sent to them via the list server.

The agency on the one hand states that it aims to provide notice "above and beyond" the statutory requirements, but on the other hand, it did not provide notice of meetings regarding the grant applications to the people who had specifically signed up to receive notices about the grant program. AEA's choices regarding use and disuse of the list server appear to be neither intelligible nor understandable, or in other words, arbitrary.

It is not necessary for the ombudsman to offer an opinion on whether AEA complied with the Open Meetings Act's legally required "reasonable notice" for the April 27 and August 16 meetings. The ombudsman suspects that AEA may have failed to provide "reasonable notice," but the ombudsman has the ability to find an agency's actions "unreasonable, unfair, oppressive, *arbitrary*, capricious, an abuse of discretion, or unnecessarily discriminatory, *even though in accordance with law.*" See AS 24.55.150(a)(2).

The ombudsman proposed to find this allegation *justified*.

AEA Response: The agency did not dispute this finding.

***Allegation 3: Contrary to law: AEA failed to award grants using the priorities required by AS 42.45.375(d).***

AEA's use of the statutory priorities as a tie-breaker in the event that there were too many projects recommended for funding than it had funds available appears reasonable. By statute, the agency is required to consider the technical merits of each project as well as consider the statutory priorities. We cannot say that the agency's decision to use the priorities only in the event that it did not have enough funds to award grants to all projects recommended for funding is an unreasonable interpretation of the statute.

The ombudsman proposed to find this allegation *not supported*.

AEA Response: The agency agreed with this finding.

***Allegation 4: Unfair: AEA allowed its contractor to review applications and make grant recommendations for applications where the contractor's staff participated in several of the proposed projects, creating a conflict of interest.***

The Fund's enabling statute appears to contemplate some potential conflict because it specifies that AEA may contract with the University of Alaska to "provide technical and economic review and analysis for the advisory committee . . . and data acquisition of the projects awarded grants" and yet also gives applicants a priority for partnering with the University of Alaska or another Alaska postsecondary institution.

The ombudsman investigator found that the majority of the Complainant's allegations on this aspect of the complaint were not substantiated – there was no evidence to suggest that the specific affiliated faculty involved in the Fund evaluations were also participating in proposals submitted for Fund grant funds. There also did not appear to be merit to most of the Complainant's allegations that several proposals had partnered directly with ACEP or AHERC, an organization housed within ACEP.

However, the agreement between AEA and ACEP provided that ***all*** ACEP staff would be prohibited from participating in proposals submitted to the Fund program, which was later confirmed by AEA Executive Director Sara Fisher-Goad. Mr. Sheets, an ACEP staff member, is listed as a technical lead in one of the proposals selected for funding. His participation in Oceana's proposal, an applicant whose proposal was selected for funding, appears to violate the agreement.

The ombudsman proposed to find this allegation ***partially justified***. The finding that the allegation is only partially, rather than fully justified is based on the conclusion that the more general and sweeping claims of conflict of interest were not supported. The conflict of interest is limited to one proposal and one ACEP staff member, rather than multiple proposals as alleged by the complainant.

**AEA Response:** The agency first clarified that ACEP:

did not make grant recommendations for any applications. As provided by the enclosed 2012 Memorandum of Understanding (MOU) between AEA and ACEP, ACEP staff assisted in implementing the EETF by providing interim program management and also provided technical review summaries of submitted abstracts. Input from ACEP in the EETF proposal review process was limited to the technical review summaries of abstracts; these reviews were provided to the EETF Advisory Committee and AEA staff as a reference to better understand the technical readiness of each proposal's technology and proposed method of demonstration. At no point did any ACEP staff make grant recommendations or participate in any way with review of the full applications submitted in Step 2 of the EETF application process.

Turning to whether Mr. Sheets' position as ACEP staff and inclusion in an EETF proposal constituted a conflict of interest, the agency wrote:

[AEA has] no reason to believe that Mr. Sheets participated in the proposal beyond responding to inquiries regarding the hydrokinetic testbed facility. As specified in the 2012 MOU with AEA, ACEP testbed facilities were made available to all EETF applicants. The availability of the facilities was advertised to EETF applicants in a document posted to the EETF webpage 'ACEP Partnership and Testing Facilities Information' (enclosed). In the document, Mr. Sheets contact information was provided for additional details regarding the facilities and rates. Several applicants contacted Mr. Sheets regarding the facilities, and numerous applicants, including Oceana, proposed in EETF applications to use ACEP test facilities for demonstration of their technology.

Although listed on Oceana's application as a Technical Lead, Mr. Sheets had no control of the inclusion of his name in the application and his resume was not included with the application along with those of project partners. It is further apparent in the audio recording of the August 14<sup>th</sup>, 2012 presentation by Oceana to the EETF Advisory Committee that Oceana's involvement with ACEP did not extend beyond their intent to use the ACEP facility for demonstration of their technology.

[AEA has] no reason to suspect that Oceana was acting in bad faith by including Mr. Sheets name in the application; while it was the only applicant to include Mr. Sheets's name, several other applicants intending to use ACEP test facilities referenced ACEP under the Project Team section of the application. It could easily be inferred from ACEP's 'Testing Facility Information' document that the responsibilities attributed to Mr. Sheets in Oceana's application – mooring/anchoring and test site support – were services that were available to all test site customers.

Ombudsman Comment: Based on AEA's response, it does not appear that Mr. Sheets was actually involved with Oceana's proposal but rather that his name was included as a lead without his knowledge or consent. As such, we modify the proposed finding of partially justified to a final finding of ***not supported***.

## PROPOSED RECOMMENDATIONS

***Proposed recommendation 1: AEA should enforce its eligibility requirements in future grant cycles.***

The RFA stated clearly that ineligible applicants would be eliminated from the grant process. No ifs, ands, or buts. That did not happen and two applicants were allowed to proceed even though they did not meet the threshold requirement to participate in the program. It appears that the agency was at least consistent in how it treated applicants who failed to provide evidence of their eligibility by allowing both of the ineligible applicants to proceed. However, this was unfair to the applicants who submitted the required eligibility documentation as required by the RFA. Normally, the ombudsman would recommend that AEA recall the grant award made to Altaeros as it should have been rejected during the first phase of the grant process. However, we do note that the applicant "cured" its eligibility deficiency by getting its Alaska business license in May 2012, ahead of the final grant award. This should not be interpreted to mean that the ombudsman approves of allowing ineligible applicants to later cure their deficiencies. The agency must be mindful that it damages the integrity of the process when it does so.

AEA Response: The agency wrote: "After deliberation and consultation with the Department of Law, staff elected not to change the eligibility criteria in the January 27, 2012 Request for Applications (RFA) in subsequent RFAs but did identify a method to ensure enforcement of these eligibility requirements with the second EETF RFA issued on August 5, 2013:

- Documentation of eligibility was required of applicants at the time of abstract submission.
- Documentation provided with each abstract was reviewed by AEA's Grants Manager and recorded in a data entry dropdown box with triggered a go/no-go indicator to proceed with the next stage of review."

AEA's response satisfied the ombudsman's recommendation.

***Proposed recommendation 2: AEA should provide public notice consistently for future EETF grant cycles.***

In its RFA, AEA misled people to believe that they would receive all public notices for future events regarding the Fund. While the agency was not legally required to send out notices of the

Fund meetings via the list server, the decision not to appear arbitrary and the agency gave no legitimate reason for its decision. The agency should either discontinue the use of list servers if it does not intend to actually use them to provide all notices to interested parties, or ensure that all notices are sent via the list server in addition to the online public notice required by state law, as was reasonably expected by the parties who subscribed to the list server. The ombudsman recommends that AEA continue allowing interested parties to sign up for notices, a practice actually mandated in giving notice of proposed regulations under AS 44.62.190(a). That statute appears to offer a best practice model that AEA can follow even when not strictly required to do so in administering its grant program.

AEA Response: The agency's executive director "directed staff to provide notice of all future EETF Advisory Committee meetings through the program's list serve in addition to the online public notice system, and to update the program's public notice procedure to reflect this change."

AEA's response satisfied the ombudsman's recommendation.

***Proposed recommendation 3: AEA should recall at least a portion of the grant funds provided to Oceana.***

AEA, by the terms of the MOU and RFA, should not have allowed Oceana's application to proceed; however, now that the grant funds have been long since disbursed, the just remedy is unclear. Brent Sheets, as an ACEP staff member, was not supposed to participate in a proposal for a Fund grant. That said, any damage from his conflict of interest was arguably limited. Although he "responded to inquires" from applicants, which creates an appearance of impropriety, there is no evidence that he actually participated in scoring any of the proposals.

For assistance in recommending an appropriate remedy, the ombudsman reviewed the provision for remedies under the state procurement code. When an agency has awarded a contract incorrectly under the procurement code, AS 36.30.585 provides possible remedies:

(a) If the procurement officer sustains a protest in whole or in part, the procurement officer shall implement an appropriate remedy.

(b) In determining an appropriate remedy, the procurement officer shall consider the circumstances surrounding the solicitation or procurement including the seriousness of the procurement deficiencies, the degree of prejudice to other interested parties or to the integrity of the procurement system, the good faith of the parties, the extent the procurement has been accomplished, costs to the agency and other impacts on the agency of a proposed remedy, and the urgency of the procurement to the welfare of the state.

(c) Notwithstanding (a) and (b) of this section, if a protest is sustained in whole or part, the protester's damages are limited to reasonable bid or proposal preparation costs.

In procurement protests, remedies may include cancelling the contract, rescoring the proposals, or leaving the contract award intact and merely paying the protester reasonable bid or proposal preparation costs.<sup>10</sup> As noted in *State, Department of Administration v. Bachner*, 167 P.3d 58

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<sup>10</sup> In grant programs, unlike the procurement code, the ombudsman is unaware of any statutory authorization to pay a Complainant the costs of preparing the grant application, so this remedy appears inapplicable here.

(Alaska 2007), a contract award can be sustained even in the face of serious “irregularities” if the prejudice to the state from cancelling the contract is too great. That decision also considered the prejudice to the successful contractor, who had acted in good faith and who had already begun construction to perform the contract.

Here, the conflicted ACEP staff did not actually participate in scoring the applications. The ombudsman presumes that Oceana’s proposal was a reasonable investment for the Fund grant program: technologically sound even though its personnel roster should have disqualified it due to Mr. Sheets’ dual role as both Oceana’s technical lead and as a member of ACEP’s staff. If this presumption is correct, then requiring Oceana to pay back all of the grant money would not serve the AEA’s interests in promoting emerging technology.

However, while AEA’s interests are not well-served by rescinding the entire grant, Oceana overlooked or outright ignored the terms of the RFA and benefitted from having done so, so the grantee is not without fault in this situation. On the one hand, recouping the entire grant award would be justified but would probably damage AEA’s efforts to promote a promising technology; on the other hand, letting the grant award stand without consequence rewards inappropriate conduct and is unfair to competing applicants who complied with all of the RFA requirements. The ombudsman recommends partial repayment – a compromise satisfactory to none, but which at least attempts to balance the competing factors here.

Ombudsman Comment: We initially found that Mr. Sheets’ listing as a technical lead in Oceana’s EETF proposal, when coupled with his position as ACEP staff, appeared to be a conflict of interest such that AEA should consider rescinding a portion of Oceana’s grant. However, based on AEA’s response to the preliminary report indicating that Mr. Sheets was not actually associated with Oceana’s proposal but that his name had been included in the proposal only because Oceana planned to use ACEP’s testbed facilities; it does not appear that this recommendation is actually warranted in light of the additional information provided by AEA.

Therefore the ombudsman will rescind Recommendation 3.

### **FINDINGS OF RECORD**

The ombudsman agrees that the steps taken by AEA address the concerns set out in the ombudsman’s proposed recommendations.

Based on the agency’s response, the finding of record will be that this complaint was *partially justified* and that it was *fully rectified* by agency corrective action.